No. 04-889

IN THE

Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
Petitioner,

v.

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 Statement in the petition is current.

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REPLY BRIEF FOR PETITIONER

1. Respondents' Opposition to Certiorari Does Not Address the Critical Reasons Why the Court Should Grant the Petition. First, the Seventh Circuit has misconstrued the Clean Water Act to allow citizen plaintiffs to litigate alleged violations, even after the State litigates the same conduct and obtains a final order requiring substantial remedial relief. According to the court of appeals, citizen plaintiffs may collaterally attack such government enforcement until a federal court determines that the government's choice of remedies ensures that there is no "realistic prospect" of future violations—the standard the court of appeals held must be met under the Act's "diligent prosecution" provision. The court of appeals reached this conclusion by holding that citizens cannot be in privity with the government for res judicata purposes unless the government's prosecution of alleged violations satisfies the no-realistic-prospect standard. In reading the Act to create this federal res judicata limitation, the court of appeals failed to apply state law, as required by 28 U.S.C. § 1738, and created a conflict with the Eighth Circuit's deci-

sion in *EPA v. Green Forest*, 921 F.2d 1394, 1404 (8th Cir. 1990), which held that the Act puts citizens in privity with government enforcers by making the citizens "private attorneys general." This conflict over the Act's proper construction and the preclusion rules applicable in citizen suits warrants this Court's resolution.

Second, the court of appeals' construction of the Act's diligent prosecution provision to allow citizen suits unless the government's enforcement leaves no "realistic prospect" of future violations expands the scope of citizen suits under the Clean Water Act, as well as under a host of other federal environmental statutes, all of which have similar diligent prosecution provisions. *See* Pet. 11, n.3. The Seventh Circuit's construction conflicts with decisions of the First, Sixth, and Eighth Circuits, which have held, consistent with *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), that the government has "diligently prosecuted" if it has sought enforcement against alleged violations and prevailed. This conflict over the proper interpretation of this crucial environmental law enforcement provision independently warrants granting the petition.

2. None of Respondents' Five Arguments for Denying Review Has Merit.

a. The Seventh Circuit held that the Clean Water Act's diligent prosecution provision itself determines whether citizen plaintiffs are in privity with the State for claim preclusion purposes. Respondents contend that the decision below is limited to construing state law. Br. in Opp'n 15-19. But the court of appeals' resort to federal law could not have been clearer:

> [I]n order for the state agency to be in privity with the public's interests, the state's subsequently-filed government action must be a diligent prosecution. . . .**We look to the language of the Act to find out what is meant by "diligent prosecution."** Citizens' suits are barred "if

> the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State *to require compliance with the standard, limitation, or order*." 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

Pet. App. 22a (italics in original, bold added).

Respondents entirely ignore this passage, though it is the linchpin in the court of appeals' holding that no citizen suit is barred by government enforcement unless a federal court first conducts a "detailed examination" of the government's remedy and then concludes that it leaves no "realistic prospect" of future violations (*see* Pet. App. 33a). Thus, while the court of appeals said that it was applying Wisconsin res judicata law, its decision in fact relies on federal law to resolve the dispositive preclusion issue, *viz.*, whether citizen plaintiffs are in privity with the State. The court of appeals created a novel and unworkable federal rule: No State can be in privity with citizen plaintiffs unless the State's enforcement meets the no-realistic-prospect standard for the Act's diligent prosecution provision. As the petition explains (at 14-15), in addition to misconstruing the Act, this reasoning contravenes the full faith and credit statute, 28 U.S.C. § 1738.

Respondents' argument that the decision below only applies Wisconsin law (Br. in Opp'n 15-17) mischaracterizes it. The decision in fact does not reference a single Wisconsin authority in deciding whether respondents were in privity with the State, instead relying on eleven federal cases and two law review articles discussing the Clean Water Act's diligent prosecution bar. *See* Pet. App. 21a-32a. Contrary to respondents' suggestion, therefore, review of the decision would not require the Court to examine Wisconsin law. The substantial, recurring questions of federal law that warrant this Court's resolution are whether the court of appeals properly resorted to federal law to decide whether this suit is barred, and, if so, whether it applied the correct statutory standard.

b. The court of appeals' remand to the district court does not threaten to make a decision by this Court moot. The Seventh Circuit remanded this case to the district court to apply its newly-created federal law preclusion principle. That principle first requires the district court to make a "detailed examination" (Pet. App. 33a) of the over $900 million of planned system improvements required by the State in the state court consent decree and then to predict whether there will be no "realistic prospect that violations due to the same underlying causes . . . will continue after these planned improvements are completed" (*id.*).

Understanding the message, the district court has ordered "the parties to submit a proposed discovery schedule and a proposal for future proceedings to enable [it] to determine whether the system inadequacies of the Milwaukee Metropolitan Sewerage District will be corrected by the improvements addressed by the 2002 Stipulation and Settlement Agreement between the State of Wisconsin and MMSD set forth in a consent decree heretofore entered by the Milwaukee County Circuit Court." Order, Dec. 2, 2004, 4. The parties are currently conducting this discovery. The parties have informed the district court that the completion of lay and expert depositions will not occur before July 29, 2005. Joint Proposed Disc. Sched., Dec. 27, 2005, 2. Although the parties disagree on whether an evidentiary hearing will be required, neither party has proposed that they submit the matter to the district court before August 15, 2005. *Id.* at 3. Consequently, the dispute created by the court of appeals is almost certain not to be concluded before next fall, at the earliest.

Additionally, while the district court denied petitioner's request to stay the matter pending disposition of a petition for a writ of certiorari, it did so in part because "there is no[] assurance that a writ of certiorari will issue." Order, Dec. 2, 2004, 3. Should this Court grant the petition, the court would presumably await this Court's decision. Accordingly, respondents' suggestion that the district court might resolve

this case and render it moot before this Court can review the court of appeals' judgment is not well founded.

More importantly, the district court's mandated inquiry into the bona fides of the State's enforcement efforts and the future effectiveness of its remediation plan causes exactly the interference with government enforcement and drain on resources that have led other courts of appeals to prohibit citizen suits that collaterally attack final government enforcement orders. *See* Pet. 20-25. That the decision below results in this ongoing harm weighs in favor of, rather than against, granting the petition.

c. The district court's possible application of Wisconsin's "fairness exception" to res judicata will not render a decision by this Court advisory. Respondents suggest (at Br. in Opp'n 18-19) that review is not warranted because the court of appeals instructed the district court to consider "Wisconsin's fairness exception to the res judicata doctrine" (Pet. App. 33a). But, as the court of appeals' decision makes clear, application of res judicata principles—and thus analysis of whether respondents are in privity with the State—must logically come first. It is this privity analysis that the Seventh Circuit improperly federalized and used as the foundation for judicial usurpation of the Clean Water Act's enforcement authority. *See id*. 32a-33a.

What is more, Wisconsin's fairness exception only applies in "special circumstances," absent here, in which the public policies favoring preclusion of a second action for the same claim are overcome by an extraordinary reason (the only reason the Wisconsin Supreme Court has ever recognized is to avoid precluding a person who sued to recover for non-malignant asbestos injuries from recovering for later-developing malignancies). *See Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 601 N.W.2d 627, 638-39 (1999). Because the citizen suit is a creation of the Clean Water Act, consideration of this "narrow exception," *id.* at 639, would require the district court to examine the Act's en-

forcement provisions, its structure, and its purpose in providing for citizen enforcement. As a result, its application would necessarily be intertwined with issues raised in the petition—*e.g.*, the primacy of government enforcement under the Act and the deference owed to a state enforcement agency's choice of remedies. Thus, the district court's possible consideration of the fairness exception does not militate against review.

d. The decision conflicts with *Gwaltney* as well as with decisions from other courts of appeals. Of course, *Gwaltney* did not create "an irrebuttable presumption" barring citizen suits following government enforcement. Br. in Opp'n 21. But respondents cannot dispute—and thus do not mention—*Gwaltney*'s instruction that the citizen suit's proper role is "interstitial," not "intrusive." 484 U.S. at 61. By requiring the district court to determine whether the State's court-ordered remediation projects ensure compliance with the Act, the Seventh Circuit's decision, like the Second Circuit's decision in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991), legitimizes intrusive citizen suits that *Gwaltney* held Congress did not intend.[1]

The error in respondents' denial that the decision below conflicts with decisions of the First, Sixth, and Eighth Circuits is made apparent by their failure to discuss any of those decisions' rationales. Instead, respondents concede that these decisions' "outcomes may differ" (Br. in Opp'n 22), but suggest that the difference results from the application of the "same legal principles" (*id.*) to different facts. Nothing could be further from the truth. Even cursory review of these deci-

[1] Although respondents make much of the court of appeals' failure to cite *Atlantic States* in narrowly construing the Act's diligent prosecution standard, there is no denying that the Seventh Circuit adopted the Second Circuit's language—requiring a determination that state-ordered remedies leave no "realistic prospect" of future violations. *Compare Atl. States*, 933 F.2d at 127, with Pet. App. 33a.

sions reveals a principled conflict with the decision below: the decision below (like *Atlantic States*) allows citizen suits to proceed unless government enforcement leaves no "realistic prospect" of future violations, while the First, Sixth, and Eighth Circuits have ruled that, when the government secures affirmative relief, it precludes tag-along citizens' suits. *See* Pet. App. 20-25; *see also* AMSA *Amicus Curiae* Br. 5-11.

Rather than make any effort to reconcile the decision below with the First, Sixth, and Eighth Circuits' interpretation of the citizen suit provision, respondents principally resort to contending that there is no conflict because the decision below cites these decisions or, in one instance, cites a decision written by the same judge who wrote one of these decisions. *See* Br. in Opp'n 17, 21-22. Regardless, as the petition explains (at 20-25), unlike the decision below, none of these courts would give citizen plaintiffs license to litigate alleged violations resolved by government enforcement—reined in only if a federal court makes an independent examination of the government's remedy and determines that the remedy leaves no realistic prospect of a future violation. Although the petition features this point prominently, respondents never contest it.

Respondents' only other attempt to harmonize the Seventh Circuit's decision with the conflicting decisions from these three courts of appeals is to suggest that two of the Eighth Circuit's decisions have materially different facts (ignoring altogether the substance of the decisions from the First and Sixth Circuits). First, respondents quote *EPA v. City of Green Forest*'s suggestion that "'there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action.'" Br. in Opp'n 17 (quoting *Green Forest*, 921 F.2d at 1404). They then contend that their allegations against petitioner make this "such a case." Br. in Opp'n 17. But, in so contending, respondents simply disregard *Green Forest*'s holding that only "where . . . the Government fails

or declines to take action, [does] the [Clean Water Act] allow[] citizens acting as private attorneys general to fill the void." 921 F.2d at 1405. Respondents do not (and could not) suggest that the State in this case "failed to take action." Under *Green Forest*'s construction of the Act, the district court's dismissal of respondents' action was proper.

Respondents also attempt to cabin the Eighth Circuit's *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), decision within its facts. Br. in Opp'n 22-23. But, as the petition explains (at 23-24), it is *Arkansas Wildlife*'s rationale that is in conflict with the decision below. The Eighth Circuit reasoned that (1) citizen suits "are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility," *Arkansas Wildlife Fed.*, 27 F.3d at 380, and (2) it would be inappropriate "to find failure to diligently prosecute simply because . . . a compromise was reached," *id.* Respondents fail even to mention—let alone confront—these propositions, which, if applied in this case, would require a different outcome.

e. Respondents' extensive (and inaccurate) factual aspersions demonstrate why this Court should grant—rather than deny—the petition. Respondents devote well over half of their brief to describing general harms from sanitary sewer overflows, contending that petitioner has been out of compliance with its permit both before and after the State's enforcement, and characterizing the State's enforcement as "lax." Br. in Opp'n 2-12, 23. Respondents' story is rife with intentionally inflammatory statements that are, at best, misleading. Respondents contend, for example, that petitioner has "discharged over 13 billion gallons of untreated sewage and storm water" (Br. in Opp'n 6)—a statement that conveniently ignores the fact that ninety-three percent of this volume consisted of permitted overflows (S. App. 233) that respondents have never asserted were illegal. The remainder was the subject of the State's investigation and lawsuit.

Respondents' tactic—and the success of that tactic in the court of appeals—underscores the need for this Court's review. Neither in their opposition brief nor at any other time have respondents claimed that the State's $900 million remedial program—a program approved by the EPA and commented on by respondents before being entered as a state court consent decree—is deficient for failing to require any specific corrective measure. The only specific remedy respondents claim is that the government failed to require penalties. Br. in Opp'n 9. But, as this Court has made clear, government enforcers must be entitled to forgo penalties to secure agreements on costly corrective measures, such as, in this case, building new facilities that increase sewer capacity. *Gwaltney*, 484 U.S. at 61.

Additionally, as *amici* have explained, if the types of allegations respondents make suffice to allow citizens to sue after a remediation agreement has been reached with government enforcement agencies, then sewerage districts (and other permitted dischargers) across the nation will have substantially less to gain by resolving alleged violations with the government. *See* AMSA *Amicus Curiae* Br. 15-16; *Amicus Curiae* Br. of CSO P'ship 15-16. This is no minor issue. For example, at the time of the Wisconsin Legislative Audit Bureau Report referenced by respondents, Boston, Detroit, St. Louis, Pittsburgh, Cleveland, and Portland each averaged more than forty overflows a year caused by wet weather. S. App. 00297. In contrast, since a deep tunnel became operational in 1994, petitioner's average annual number of overflows caused by wet weather has been fewer than four—a record that simply does not support respondents' repeated aspersions on petitioner and the State's regulators.

Under the decision below, even districts that agree to spend millions, if not billions, on new facilities and other compliance measures (as petitioner did here) will remain at risk of having to defend against costly citizen suit litigation over the same alleged violations. The Seventh Circuit's interpretation

of the citizen suit provision means that none of those suits can be dismissed without discovery and federal court proceedings to determine whether the government's enforcement leaves no "realistic prospect" of future violations. In addition to the threat of paying penalties and paying the citizen plaintiffs' attorneys' fees, this risk of duplicative citizen suit litigation will serve to make negotiated government enforcement of the environmental laws more costly and far less appealing.

The decision below thus creates bad public policy that neither the Clean Water Act nor any other environmental statute contemplates. As this Court made clear in *Gwaltney*, federal and state governments are the primary enforcers of the federal environmental laws. Citizen suits are to fill the gap when governments make *no* enforcement effort. By upsetting this allocation of responsibility, the decision below will generate duplicative litigation for permitted dischargers and make routine the second-guessing of government regulators by citizen action groups and federal courts.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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